

**SEP 14 2006**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARK K. WHITNEY,

Defendant - Appellant.

No. 03-10317

D.C. No. CR-02-00114-PJH

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Northern District of California  
Phyllis J. Hamilton, District Judge, Presiding

Submitted September 11, 2006<sup>\*\*</sup>

Before: PREGERSON, T. G. NELSON, and GRABER, Circuit Judges

Mark K. Whitney appeals the sentence imposed following his guilty plea to maintaining a place for the purpose of cultivating marijuana, in violation of 21 U.S.C. § 856(a)(1). Whitney contends, and the government correctly agrees, that

---

<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

this case should be remanded pursuant to *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc), because Whitney was sentenced under the then-mandatory Sentencing Guidelines, and the record does not indicate whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory. We therefore remand for the district to answer that question and to proceed pursuant to *Ameline*.

**REMANDED.**